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# THE INTERIM

OCTOBER 1994 HELENA, MONTANA VOL. IX NO. 17

## COMMITTEE ON CHILDREN AND FAMILIES

Committee Meets for Final Time...The Joint Oversight Committee on Children and Families met for the sixth and final time on Friday, September 16. The Committee heard reports from the following people: Hank Hudson, Department of Family Services (DFS), on recent child welfare policy evaluation by the Child Welfare League of America and on selected DFS legislation for 1995 Session; Kate Mrgudic, DFS, on the progress of the Partnership Project and federal Family Preservation and Support funding; and Jack Ellery, DFS, on budgeting, staffing, and client information for various DFS services. Committee staff reviewed an inventory of prevention programs and study plan accomplishments.

The Committee discussed the following study issues that were held over from the August 12 meeting: the addition of a citizen member to local adult protective services teams and support for increases in state-assisted child care provider rates. No action was taken on these topics, but the Committee recommended draft legislation (LC 33) to reauthorize the Joint Oversight Committee on Children and Families and to include a study directive for further investigation of improvements in adult protective services. Interested parties were invited to comment on all study recommendations, as reported in the September 1994 INTERIM.

HELENA, MONTANA

## REVENUE OVERSIGHT COMMITTEE

Committee Holds Joint Meeting...The Revenue Oversight Committee met on September 8 and a variety of matters were considered. Sitting in joint session with the Legislative Finance Committee (LFC), the combined membership heard a presentation from Legislative Fiscal Analyst Clayton Schenck and the LFA staff on the current status of Montana's state fiscal 1994-95 budget and some prognostications about the fiscal 1996-97 budget. In short, revenue appears to be exceeding estimates adopted during the November 1993 Special Session, while expenditures are about as expected, fire fighting costs being one major exception.

Committee Hears from SID Subcommittee...After the joint meeting with the LFC, the Committee met to discuss other matters. The first order of business was a report from the Subcommittee on SIDs and RSIDs (Special Improvement Districts and Rural Special Improvement Districts) wherein the Subcommittee recommended that legislation be sponsored by the Revenue Oversight Committee providing that certain county improvement districts may declare bankruptcy under federal municipal bankruptcy law. The Subcommittee also recommended Revenue Oversight Committee sponsorship of legislation that would revise laws concerning the financing of special improvement districts and rural special improvements districts. Both proposals were adopted by the full Committee.

DOR Reports on Project 95...Staff from the Department of Revenue (DOR) reported on Project 95, a partnership effort to simplify and standardize the taxation of oil and natural gas production in Montana. The goals of the Project 95 working group were to: (1) consolidate the number of taxes on oil and gas production; and (2) structure the taxes in a manner that facilitates taxpayer compliance and is cost effective for the DOR to administer and audit.

One of the recommendations resulting from Project 95 is that various taxes and tax rates should be consolidated into four tax rates for the working interest and one tax rate for the royalty owners. For example, the recommended tax rate on a working interest on pre-July, 1985 wells is 14.1%. It consolidates the local government severance tax rate of 8.4%, the state severance tax rate of 5%, the 2% oil and gas privilege and license tax used to support the Board of Oil and Gas Conservation, and the 0.5% resource indemnity trust tax. Other recommendations include a single form reporting mechanism and a consistent, quarterly payment schedule.

If the Project 95 recommendations are adopted, there will be impacts to the industry and to counties and school districts. As with any major tax reform, there will also be individual winners and losers, even though Project 95 participants agreed that the overall impacts are virtually revenue neutral. The distribution of tax revenue from oil and gas

producers was one of the more contentious matters dealt with by the Project 95 group, and some changes may still be needed.

Committee Sets Next Meeting Dates...Other administrative matters before the Committee were also discussed. The next meeting of the Committee is tentatively scheduled for November 30 and December 1. At that meeting, the Committee will establish revenue estimates for consideration by the 54th Legislature. Questions regarding the Committee's activities can be directed to Jeff Martin of the Legislative Council staff, 444-3064.

## SUBCOMMITTEE ON WORKERS' COMPENSATION ALTERNATIVES

Subcommittee Discusses Contractor Licensing...The Subcommittee on Workers' Compensation Alternatives held its final meeting on September 23. The issue of licensing contractors was addressed in the morning session by representatives from the Department of Commerce, the Department of Labor and Industry, the Montana Building Industries Association, and the Montana Contractor's Association.

Subcommittee Hears from Working Groups...A report was heard from the Independent Contractor Working Group. Representative Vicki Cocchiarella is working on some proposed legislation that will be circulated among the members of the working group for comment.

A report was heard from the Employee Leasing Working Group. The group has outlined its concerns in this area and is working with a representative from the Professional Employer Organization industry on draft legislation for next session.

The Subcommittee encouraged each group of interested parties to work together to bring consensus proposals to the next session.

Subcommittee Hears from Agencies...In the afternoon, the Department of Labor and Industry, the State Fund, the Department of Justice, and the Department of Revenue provided the Subcommittee with reports on the issues of fraud, safety, medical cost containment, the Old Fund Unfunded Liability Tax, the Old Fund and New Fund balances, and progress made in inter-agency coordination. Each of these agencies was extremely helpful in providing the Subcommittee with information throughout the interim and was very open to suggestions and inquiries

by the members. Their cooperation, as well as that of all of the interested persons, is greatly appreciated.

Subcommittee Reviews Interim Work...In conclusion, the Subcommittee reviewed its interim work and agreed that the interim has been one of study and further education on workers' compensation issues. The Subcommittee agreed that the final report should reflect its information gathering on the issues of 24-hour coverage, independent contractors, employee leasing, and contractor licensing; and also include a summary of the progress of the implementation of the workers' compensation legislation from the 1993 session.

## SUBCOMMITTEE ON VETERANS' NEEDS

Subcommittee to Sponsor Three Bills...The Subcommittee on Veterans' Needs held its final meeting on September 9. The Subcommittee will recommend three pieces of legislation that will be introduced in the next session:

- a resolution to the Department of Commerce and the Board of Housing to include a variable on veteran status in housing studies and surveys, and to develop special veterans' housing programs within existing authority;
- a bill raising the allowance for headstones, provided to veterans by Congress, from \$30 to \$70. The bill will also provide an appropriation to allow the counties to withhold from their monthly remittance to the state treasurer up to \$40 for each headstone; and
- a bill to provide honoraria for veterans of Grenada, Lebanon, Panama, Desert Storm, and Desert Shield who were Montana residents at the time of entry into military service.

Subcommittee Makes Other Recommendations...Other recommendations of the Subcommittee include:

- a June 1994 recommendation to the Montana Health Care Authority regarding long-term care and overall health care needs of veterans;
- the provision of aging services and housing information to veterans' field officers;

- a reevaluation of veterans' nursing care needs in the future;
- commending veterans service organizations involvement with nursing homes and encouraging further cooperation with nursing homes in providing services to veterans; and
- encouraging the appropriate state agencies to continue endeavors to provide in-home care to those in need.

Subcommittee Discusses Final Report...The Subcommittee expressed a desire to reflect in its final report the proposed legislation, other recommendations and considerations, and information provided by Jim Jacobsen of the Veterans Affairs Division of the Department of Military Affairs.

Thanks goes to the veterans service organization's representatives and the state agencies who provided information and support throughout the interim.

## JUDICIAL UNIFICATION AND FINANCE COMMISSION

Commission Finishes Work...The Judicial Unification and Finance Commission (JUFC) completed its study of Montana's court system and finalized its recommendations on September 15.

The JUFC was charged with examining court unification, court finance, judicial selection, and other matters related to the efficient operation of the Montana Judiciary. After eight meetings, a problem identification survey of county commissioners, district and magistrate judges, and clerks of district court, a panel discussion with national and state experts, a public hearing, and its own deliberations, the JUFC has developed 13 recommendations, including seven proposed bills.

Commission Makes Recommendations...While the JUFC stopped short of recommending a unified and state-funded court system, the JUFC's key recommendations are designed to improve judicial administration and to address a fiscal crisis facing some counties struggling to fund their district court operations.

The JUFC's main recommendations are summarized below.

## COURT FUNDING:

Recommendation #1 - The Legislature should establish a 50/50 cost-sharing program so that the state pays up to 50% of each county's most volatile or uncontrollable court expenses in civil cases: indigent defense, juvenile probation, and court reporter salaries. The program should be funded by enacting a mandatory 0.1% light vehicle tax and reducing the 0.5% optional light vehicle tax to 0.4%. The 0.1% light vehicle tax is expected to raise about \$2.6 million annually. (Bill draft LC0067)

Recommendation #2 - To avoid future funding shortfalls and to address the inequities inherent in a funding system based on the taxable valuation of property within each county, the state should eventually assume total funding responsibility for Montana's district courts. State assumption of district court funding should be explored in the context of comprehensive tax reform.

Recommendation #3 - The state should fund from the general fund the detention, evaluation, and care of the mentally ill during district court involuntary civil commitment proceedings. Psychiatric evaluation and treatment costs incurred by counties as a result of district court cases transcend county boundaries due to the transient nature of the mentally ill population. (Bill draft LC0130)

Recommendation #4 - Make postconviction relief expenses reimbursable under the District Court Criminal Reimbursement Program. (Bill draft LC0066)

Recommendation #5 - The judicial branch as a whole, and each court individually, should actively seek funds being made available to state courts through the federal crime control bill and court grant programs.

## JUVENILE JUSTICE

Recommendation #6 - The Legislature should thoroughly examine and expeditiously address problems with Montana's juvenile justice system, especially confidentiality, sentencing, and extended jurisdiction issues involving serious juvenile offenders.

## COURT ADMINISTRATION

Recommendation #7 - Montana should retain a seven-member Supreme Court by repealing the sunset on 3-2-101 MCA. If the sunset is not repealed, Supreme Court membership will be reduced from seven

members to five members on July 1, 1997, which will significantly increase the caseload on the remaining Supreme Court justices and could increase court delay. The Governor's Task Force to Renew Government independently concluded and also recommends retention of a seven-member Supreme Court. (Bill draft LC0062)

**Recommendation #8** - The Montana Supreme Court should establish a judicial advisory council to conduct long-range strategic planning for the judicial branch. The judicial advisory council's ultimate objective should be to explore judicial branch issues related to state court administration, operation, and finance and to advise the Montana Supreme Court, as well as the Legislature, on immediate and long-term judicial issues.

**Recommendation #9** - The Legislature should amend current statutes to clarify that the Chief Justice rather than the governor may temporarily assign district judges to other districts, if necessary, to manage caseloads. (Bill draft LC0063)

#### COURT INFORMATION AND TECHNOLOGY

**Recommendation #10** - To fund a state judicial branch court information technology program, the Legislature should impose a \$5 user surcharge on all filings in civil cases and upon conviction or forfeiture of bond or bail in criminal cases. The surcharge should apply in all courts of original jurisdiction and should be imposed in addition to existing fees. (Bill draft LC0065)

**Recommendation #11** - The Legislature should require counties to establish a District Court Records, Retention, Preservation, and Technology fund, raise by \$5 certain district court fees, and provide that \$5 be deposited into the records preservation fund in order to maintain and store district court records. (Bill draft LC0064)

**Recommendation #12** - The Legislature, the Supreme Court, and the judiciary as a whole should strongly support and encourage the use of available technology, especially the Montana Educational Telecommunications Network (METNET), to improve court operations. The METNET system, which provides a two-way interactive video conferencing capability, should be made available to as many courts as possible, so that initial hearings can be conducted without the cost and security risks of transporting a defendant from the jail or detention center to the court of jurisdiction.

**Recommendation #13** - The Department of Commerce and the Office of Court Administrator should work together to modify the Budgetary

and Accounting Reporting System (BARS) format to establish a more uniform system for county reporting of expenditures for court operations. Uniform and accurate reporting of expenditure data is essential to determining the fiscal status of Montana's court system.

Staff Preparing Final Report...Legislative Council staff is preparing the JUFC's final report. If you would like more information about any of the JUFC's recommendations, please call Sheri Heffelfinger or Valencia Lane at the Legislative Council, 444-3064.

## LEGISLATIVE FINANCE COMMITTEE

Committee Holds 2-Day Meeting...The Legislative Finance Committee met in Helena on September 8 and 9 to hear a number of reports and to take action on a number of issues.

1997 Biennium Preliminary Budget Projections...The Committee heard a staff report on preliminary projections for the general fund and school equalization (SEA) account fund balances in the 1997 biennium. The report shows a more optimistic outlook than the Legislature has seen in a decade, with a projected surplus of \$18.7 million over present law levels at the end of the 1997 biennium (after leaving a reserve of \$48.3 million). This compares to a deficit of over \$200 million faced by the 1993 Legislature.

The improved budget outlook is due to two factors: 1) stronger revenue growth, primarily from income taxes; and 2) the efforts of the 53rd Legislature in achieving a structural balance of revenues and expenditures for the first time in recent years. Over 75 percent of the anticipated growth in present law expenditures is in Medicaid costs. Although rates of increase have declined in the 1995 biennium, there is still a strong indication of double digit percentage growth in Medicaid costs.

Highways Cash Flow Projections...The Committee heard a staff report on the status of the highways state special revenue fund, used to fund highway construction and highways related activities. At the end of the 1993 legislative session, the account was projected to have a structural imbalance (expenditures exceeding revenues) by up to \$9 million each year and an anticipated cash shortage by the end of the 1997 biennium. An improved fund outlook is now projected due to higher than anticipated fuel tax revenues, resulting from House Bill 539 revenue collection measures (providing for higher tax payment compliance) and increased consumption. Revised projections anticipate that ongoing revenues will



slightly exceed expenditures at current service levels, and that the account will have a surplus at the end of the 1997 biennium.

Budget Amendments...The Committee reviewed 50 budget amendment requests, adding \$20.3 million spending authority and 12.3 FTE, and determined that all of the requests met the statutory criteria. The budget amendments include \$9.2 million federal and \$11.1 million university current unrestricted fund spending authority. Total budget amendment requests for the 1995 biennium reviewed by the Committee, plus those approved in House Bill 4 in the 1993 session, are \$40.6 million and 42.7 FTE.

Groundwater Assessment Program Fund Shortage...The Committee heard a staff report on the status of the Groundwater Assessment Program, which faces a potential 70 percent reduction in anticipated funding in fiscal 1995. The reduction is due to an apparent oversight in the enabling legislation and a sharp reduction in revenue collections compared to estimates. The Committee approved a resolution to support the recommendations of the Revenue Oversight Committee (ROC), subject to the possibility that the Governor's environmental contingency account might also be used to address the shortfall. The three ROC recommendations include: 1) the use of an interentity loan; 2) drafting of correcting legislation for the 1995 Legislature that would deposit a portion of the metalliferous mines license tax to the groundwater assessment account; and 3) use of a supplemental appropriation request to the 1995 Legislature.

Corrections System Report...The Committee heard a report on the Montana corrections system that: 1) details regional and national comparisons; 2) discusses Montana corrections profiles; and 3) defines recidivism and analyzes recidivism factors. The report provides baseline data for new program evaluation and presents issues that may be considered during legislative policy discussions. Included in the 15 issues presented were:

- Drug offenses are increasing, resulting in a greater probation/parole population and a greater need for community treatment services.
- Prisoners are receiving longer-term sentences, which may contribute to an expanding and aging prison population.
- Expenditures per average daily population vary widely throughout the system.
- Young male property offenders are more likely to recidivate than are others who are released.

- Increased supervision after release from prison appears to help reduce recidivism.

Realignment of Appropriations Subcommittees...The Committee adopted a recommendation of its subcommittee to realign the appropriations subcommittees. The realignment is intended to provide a more even distribution of workload among subcommittees and greater functional alignment of budgets within subcommittees. The realignment will:

- move law enforcement and public safety agencies from the General Government to the Institutions subcommittee;
- move the Department of Health and Environmental Sciences environmental programs from the Human Services to the Natural Resources subcommittee; and
- move the cultural grants and the budgets of the Library Commission, Arts Council, and Historical Society from Long Range Building and Institutions subcommittees to a new special subcommittee.

The Committee forwarded the recommendations to legislative leadership for approval.

Senate Bill 378 Study...The Subcommittee on Senate Bill 378 (review of state special revenue accounts and statutory appropriations) presented its recommendations to the full Committee. The recommendations reflected the Subcommittee's overall philosophy of reducing the amount of earmarking and reducing the use of statutory appropriations to fund agency operating expenses. The Committee approved the following actions, de-earmarking approximately \$256 million and eliminating 79 accounts and 15 statutory appropriations:

- Direct staff to follow-up on accounts that should be deleted, reclassified, or analyzed due to high fund balances.
- Amend statute to de-earmark all revenue sources to the school equalization aid account except permanent school trust interest and income. Total funding for public schools would not automatically change.
- Amend statute to separate Department of Transportation gross vehicle weight fees and fuel tax revenue from other revenue not restricted by the Montana Constitution.

- Amend statute to separate Department of Livestock per capita levy revenue from other revenue not restricted by the Montana Constitution.
- Amend statute to combine into one allocation the current coal severance tax allocations for: 1) school equalization; 2) local impact; 3) Montana Growth Through Agriculture; 4) renewable resource development bond fund; 5) renewable resource loan debt service fund; 6) county land planning; 7) state library commission; and 8) conservation districts. These programs would not be eliminated. The money in this account would be available for prioritization and appropriation by the Legislature for these eight programs.
- Amend statute to de-earmark all lodging facilities tax revenue and deposit the revenue in the general fund.
- Amend statute to de-earmark 50 percent of Justices' Court fine revenue to the state general fund.
- Amend statute to de-earmark Department of Fish, Wildlife and Parks revenue from: 1) wildlife restitution payments; 2) motorboat certification identification fines; 3) snowmobile registration fines; and 4) off-highway vehicle fines. These funds will be deposited in the general fund.
- Amend statute to de-earmark Department of Health and Environmental Sciences civil penalties. Penalties would go to the general fund.
- Amend statute to de-earmark miscellaneous fines and forfeitures. Revenue would be deposited to the general fund.
- Enact the following clean-up legislation: 1) amend coal severance tax statute to express all allocations as percentages of total collections rather than as percentages of a balance; 2) amend gasoline dealers' license tax statute to express allocations as percentages of net revenue, as per a 1980 Attorney General opinion, rather than percentages of gross revenue; 3) amend lodging facilities use tax statute to express all allocations as percentages of total collections rather than as percentages of a balance; 4) clarify existing statute (and SB378 intent) by amending statute to allocate 100 percent of interest earnings from all coal severance tax funds to the general fund.
- Eliminate 15 statutory appropriations.

- Enact the following changes to Senate Bill 378 statute: 1) add principles and criteria for revenue dedication; 2) add principles and criteria for statutory appropriations; 3) require application of the principles and criteria by legislative and executive branch agencies; and 4) eliminate the Department of Administration required review of proprietary accounts and replace its required review on state special revenue accounts with a survey of all accounts to be provided to the Legislative Finance Committee.

SRS Update...The Committee heard an update from Peter Blouke, Director of the Department of Social and Rehabilitation Services, on human services cost estimates for the 1997 biennium and on the status of development of managed care contracts. The Department plans to make a final report to the Committee on these two issues (as required by House Bills 33 and 34 from the 1993 Special Session) at the November meeting.

Juvenile Programs Management Report...In response to concerns raised at its June 1994 meeting, the Committee heard a report by staff of the Department of Family Services on the management of the Mountain View and Pine Hills Schools. The Department discussed reasons for declining school populations and planned changes in the roles of the schools. The Committee also heard testimony from school staff and private citizens on the management of the schools.

LFC to Meet Again in November...The Committee set November 18 as the date for its next meeting.

## WATER POLICY COMMITTEE

Committee to Meet in October...The Water Policy Committee will meet on Friday, October 7 in Room 104 of the State Capitol.

At the August meeting, the Committee made a preliminary recommendation to grant no additional forfeiture remission to late water claim filers beyond the remission granted in SB 310. The Committee will make a final recommendation at the October meeting.

The Committee will also review and receive updates on its 1993-94 work plan. The Committee is expected to make preliminary recommendations on specific work plan sections for its report to the 1995 Legislature.

For more information on these issues, please contact the EQC staff at 444-3742.

## ENVIRONMENTAL QUALITY COUNCIL

Council Meets on Last Day of September...The Environmental Quality Council met on Friday, September 30. In the morning, the Council held a joint meeting with the Legislative Audit Committee to review the DHES Water Quality Bureau Performance Audit.

The Hazardous Waste Study/Working Group presented its recommendations to the full Council for review and discussion.

The Regulatory Enforcement Subcommittee met on Thursday, September 29 to discuss the enforcement study. The Subcommittee reported to the full Council with recommendations regarding study framework, scope, and timing issues.

The Council reviewed the Governor's Renewing State Government Task Force proposal regarding natural resource agency reorganization.

Exact details of the meeting were not available at press time. A full report of the meeting will appear in the November INTERIM. If you wish further information, please contact the EQC staff at 444-3742.

## LEGISLATIVE COUNCIL

Caucuses Set for November 19...Current leadership and available deans of the caucuses have confirmed that the pre-session caucuses will proceed on Saturday, November 19. Plans are to begin the caucuses early enough on Saturday to allow completion of work in time for those legislators who wish to attend the Grizzly-Bobcat game later that day to do so.

The Legislative Council has given its imprimatur to an all-day orientation session to be held Friday, November 18. An orientation invitation will accompany the official caucus notices shortly after the election.

Session Communications...The capacity of legislative communications services has not kept pace with changing public demands or the availability of new technologies. Last session, this was especially true in the inability to handle all the telephone calls and faxes that came in for both information and messaging. The Legislative Council is working to provide better services through a variety of means without having to make a large net demand on the general fund. To date, the following arrangements have been made:

- Bill Status: Beginning in early December, callers with a computer, modem, and communications software properly set will be able to dial into the bill status system directly without prior sign-up. Charges will be \$2.00 for the first minute and \$1.00 for each additional minute. This service will replace the \$200 flat rate charge with prior sign-up used in past years.
- Legislative Information: Callers dialing this number will reach the Legislative Information Office. The operators in this office receive calls requesting information on the Legislature. A separate number will be used for legislative and messaging at the same price. Callers may be transferred from one service to the other. The cost per call will be \$0.75 a minute.
- Legislative Messaging: This service is split off from the information service. As described above, a caller may be transferred from one to the other. Currently, the option to contract out answering this service is being explored. Delivery of messages in the Capitol and limited paging in the halls have traditionally been a part of this service. The huge growth has been due to the popularity of organized calling trees as a substitute for mailed messages. Cost for the service will be \$0.75 a minute.
- Fax: Incoming faxes have overwhelmed the information office. Calls to the fax number will come directly to machines in the information office. Cost will be \$2.00 for the first minute and \$1.00 for each additional minute.

A paper on "Legislative Communications Services" that discusses the background of these and related issues is available from the Legislative Council.

## THE BACK PAGE

The 1993 Legislature passed Senate Joint Resolution 15 calling for an interim study of how the Montana Commission for Human Rights might speed up the processing of discrimination complaints brought under various provisions of Title 49, generally known as the Human Rights Act. In preparing to fulfill this assignment, the question arose why "human rights" were the terms attached to laws and an enforcement agency with a relatively narrow purpose--to protect individuals from discrimination on the basis of race, creed, religion, color, national origin, age, handicap, marital status, familial status and political belief in the areas of employment, public accommodations, housing, financial and credit transaction, insurance, education, and government services.

This month's the "Back Page" examines the term "human rights" and the delicate balance between rights and responsibilities. The topic invites serious argument and warrants further research. Additional information is contained in the report "Administering and Enforcing Montana's Human Rights Laws", which will be available in December from the Legislative Council.

### SOME FUNDAMENTALS OF HUMAN RIGHTS LAW

by Stephen Maly

#### WHAT ARE HUMAN RIGHTS?

The concept of individual rights is rooted in antiquity. The inhabitants of Greek city-states enjoyed, as a consequence of their citizenship, rights to property, freedom of speech, and equality before the law. (Slaves were not citizens, and therefore had no such rights.) Later, philosophers recognized the need for firmer footing, since societies tend to break down at irregular intervals, and leave citizens at the mercy of merciless thugs, tyrants, and dictators. The Stoics asserted that certain rights should be considered universal--something to which people are entitled, simply by virtue of being human, no matter their circumstance in space or time.

#### NATURAL VERSUS POSITIVE RIGHTS

By the eighteenth century, philosophers borrowed from these earlier times in elaborating a natural rights doctrine. They held that "government does not grant rights; it is established to protect rights possessed by individuals by virtue of nature and nature's God." Perhaps the best-

known articulation of the natural rights thesis is the Declaration of Independence. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness." This was and continues to be a radical proposition. It provides a strong but immaterial foundation for the continuing belief in universal human rights.

The concept of natural rights coexists with its opposite, the positive rights doctrine. The latter holds that the only rights humans have are those granted and enforced by government. Positivists argue that it is meaningless to talk about human rights outside a court of law. Jeremy Bentham, one of the foremost exponents of "legal positivism" wrote: "Natural rights is simple nonsense; natural and imprescriptible rights (an American phrase), rhetorical nonsense, nonsense upon stilts."

Legal positivism lost most of its logical appeal after the Second World War, as Hitler's Third Reich had effectively legalized genocide. The awful yet "lawful" atrocities of that and subsequent totalitarian regimes elsewhere in the world breathed new life into natural rights theory. The 1948 "Universal Declaration of Human Rights" was drafted and endorsed by the United Nations for the purpose of transforming natural rights into positive rights by making them enforceable. Because the Declaration itself was not binding (it was and remains comparable to a legislative joint resolution), the next step for human rights advocates was to come up with something more forceful. The result was a pair of closely related treaties known separately as the "Covenant on Civil and Political Rights" and the "Covenant on Economic, Social and Cultural Rights", and jointly with the Declaration as the "International Bill of Rights".

It is important to note that the International Bill of Rights is largely a product of American thinking and American effort. Eleanor Roosevelt was among the Declaration's most energetic supporters. Scholars trace the origin of the Covenant on Social, Economic and Cultural Rights to Franklin Roosevelt's 1941 address to Congress, in which he enumerated these four freedoms as the basis of civilized society: freedom of speech and expression; freedom to worship God in one's own way everywhere in the world; freedom from want, and freedom from fear. In 1944, FDR told Congress that the people of the United States cannot be content "if some fraction of our people--whether it be one-third or one fifth or one tenth--is ill-fed, ill-clothed, ill-housed, and insecure."

President Roosevelt went on to recommend an Economic Bill of Rights, which was never passed, but its basic construct reappeared in the aforementioned international Covenants, which entered into force in 1966 and were ratified by the United States Senate in 1979. Proponents agreed that two separate covenants were required, because civil and political



rights (such as rights to vote and to freedom of expression) could be secured immediately, while economic, social and cultural rights could only be secured progressively, according to each country's material and organizational wherewithal.

By ratifying the Covenant, the U.S. Senate mandated the federal government to take steps toward "the progressive realization" of the right to gain a living by work; to possess adequate housing; to be free from hunger; to receive health care; and other benefits "to the full extent of its available resources." Despite the fact that the United States is legally bound to honor its treaty commitments, and that the treaty's provisions extend to "all parts of Federal states without any limitations or exceptions," the International Bill of Rights is anything but settled law in this or any other land.

#### UNIVERSAL HUMAN RIGHTS--ARE THEY AVAILABLE LOCALLY?

Human rights seems a misnomer when applied to Montana. Any discriminatory behavior on the part of some employers, managers, landlords, et. al., is literally worlds apart from the pattern of abuses of basic human rights in countries such as Haiti, Somalia, and the Peoples Republic of China. Still, we have problems, not least of which is the lack of a general consensus as to just what constitutes a right, notwithstanding a sturdy (and much studied) constitution, thick books of statutes, and international law. Our own statutes do not define human rights; the substantive language bears greater relation to the federal Civil Rights Act than anything in the International Bill of Rights. Moreover, many citizens regard some rights as sacrosanct, other rights as mere ideals.

Under U.S. civil rights law and state human rights law, citizens have an enforceable right to obtain housing and employment without discrimination. Rather than an outright guarantee of adequate shelter for all citizens (a nominally universal human right), the operative principle of fair housing today is that all persons have a right to live where they can afford to live. The right to work is contingent on a person's ability to perform the required work. Other economic and social rights are likewise regarded as conditional. For something to be a right, the argument goes, it has to be earned. Adequate medical care, for example, can be justly considered a right, but not a universal one. It is an acquired right in that it has first to be provided for in some fashion, such as through taxation or voluntary payment into a private insurance fund.

## THE BALANCE BETWEEN RIGHTS AND RESPONSIBILITIES

Rights bear close relationship to duties and responsibilities. Scholars and commentators often speak of individual rights being counterbalanced by individual obligations. Whereas some human rights -- life, liberty, pursuit of happiness -- are regarded as self-evident and simply cannot be earned, most civil rights at least imply a reciprocal duty or responsibility. The Montana Constitution acknowledges, in Article II, Section 3, that "certain inalienable rights" are enjoyed in "recognition of corresponding responsibilities." In concept, employers and employees, landlords and tenants, citizens and their elected officials: all have mutual responsibilities that parallel their rights.

Still another way to look at this is as a delicate balance of competing rights and obligations. All citizens have rights TO certain things, and rights to be free FROM other things. Neither property rights nor other constitutional rights are absolute. There is a tension between the right to be free from discrimination and the right to freely exercise privacy and property rights. A viable property right includes the right to exclude others, and the ability to enforce that exclusion; in other words, to be discriminating.

Discrimination has several meanings. To discriminate means, according to Webster, "to make a distinction; to use good judgment; to treat differently or favor on a basis other than individual merit." Discrimination also connotes "the act, practice or an instance of discriminating categorically rather than individually; prejudiced or prejudicial outlook, action, or treatment."

Human rights laws do not outlaw discrimination of all types. There are both implied and explicit exemptions from and exceptions to the stipulations in Title 49 of the Montana Code Annotated. For example, the first clause in 49-2-304, MCA reads: "Except when the distinction is based on reasonable grounds..." Another example in the housing arena: It is legal to discriminate on the basis of sex, marital status, race, creed, religion, age, familial status, physical or mental ability, color, or national origin IF you are offering to rent a sleeping room in your private residence AND you do not rent out more than three rooms within the same house.

Our laws are infused with common sense and business reasoning. The government does not, in most instances, provide direct guarantees of a job and housing to individuals, but it does set forth rules by which private providers of both are obliged NOT to unfairly discriminate against certain groups of people. In the United States, barring calamity, no one can be forced to rent living space or to hire employees. When someone chooses to do so, however, the relationships that arise are circumscribed

to the extent of the laws protecting the rights of individuals from unfair discrimination. Abiding by human rights laws is the price citizens must bear in exchange for the exercise of property rights in the realm of commerce.

Achieving a publicly acceptable and broadly supported balance of rights with reciprocal responsibilities is vitally important to meeting Montanans' needs for employment and housing. If the rights of tenants and employees outweigh those of landlords and employers, the latter group may remove their property from the market: businesses could shut their doors and affordable housing would be even more difficult to obtain. If the balance tilts too far in favor of property holders, American Indian families, single mothers with children, disabled people, and other disadvantaged citizens will be denied that window of opportunity which spells the difference between forced dependency and self-reliance.

#### SUMMARY AND CONCLUSION.

To summarize, human rights are not ideals, but they are often regarded as such. One reason for this is that only some human rights are both universal and enforceable. Others are enforceable, but not universal; these might be called "earned" or "acquired" rights. Confusion and disagreement over the difference make human rights law enforcement an uphill struggle.

Today, international human rights laws prescribe the right to work; the right to equal pay for equal work; the right to social security; the right to an adequate standard of living; the right to the enjoyment of the highest attainable standard of physical and mental health; and the right to an education, among others. The Montana Constitution declares in Article II, section 3, that all persons have a natural right "to pursue life's basic necessities." The connection between human rights in Montana and human rights abroad is thin, but strong. Montana's human rights laws may never guarantee the rights spelled out in the International Bill of Rights. For the moment, they are aimed at eliminating unfair discrimination which prevents people from meeting some of their most basic needs.

There seems to be something essential underlying the whole bookish endeavor of human rights advocacy. Human rights rest on an invisible pillar of common conviction, that human beings possess certain inalienable rights even when constitutions crumble. Is this "nonsense on stilts" or the scales of justice on wheels?.



## INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED,  
ALL ROOM DESIGNATIONS ARE IN THE CAPITOL

### OCTOBER

October 4, Legislative Oversight Committee on Montana-ARCO  
Litigation, Conference Room, Old Livestock Building, 1:30 p.m.

October 7, Water Policy Committee, Room 104

October 10, Columbus Day observed, holiday

October 17, LFC's Working Group for Non-Medicaid Human Service  
Provider Budget Methodology, Room 104

### NOVEMBER

November 8, Election Day, holiday

November 18, Legislative Finance Committee, Room 104

November 24, Thanksgiving, holiday

November 30 - December 1, Revenue Oversight Committee





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